No. 4067

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BANKERS DISCOUNT CORPORATION, a corporation, and COAST SHIPBUILDING COMPANY, a corporation,
Appellants,

vs.

STEAMSHIP "EGERIA," her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture, and F. H. RANSOM, TRUSTEE, and J. V. MASON, and UNITED SHEET METAL WORKS, a corporation,
Appellees.

BRIEF OF APPELLEES, F. H. Ransom, Trustee, and J. V. Mason.

Upon Appeal from the District Court of the United States for the District of Oregon.

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Proctors for Appellants.

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HOUGHTON-CARSON COMPANY, PRINTERS

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STATEMENT OF THE CASE

The Steamship "Egeria" was purchased from the Emergency Fleet Corporation by a syndicate composed of various individuals, firms and corporations. The

ownership in the vessel was divided into 1,000 shares of $3,500.00 each. Appellant, Coast Shipbuilding Company, owned 39/100 of the vessel and was the managing owner. The Coast Shipbuilding Company had fitted the vessel for service and had expended more than was contemplated in fitting out the vessel. The Coast Shipbuilding Company was indebted to appellant, Bankers Discount Corporation. The vessel was fitted out and sent on a voyage to Australia and lost considerable money on the voyage, due partly to the management of the vessel and partly to her construction which limited her cargo carrying space. It became necessary to secure the sum of $35,000.00 to make up the deficit from the Australian trip and to make certain alterations to enable the ship to be operated profitably.

Donald W. Green, was a stockholder, director and secretary of Coast Shipbuilding Company and was managing its affairs. He had endeavored to raise the needed money in various ways but had been unsuccessful. Finally a meeting of some of the shareholders was held at which Green and one other director of the company were present and the plan of raising the money by mortgaging the vessel was discussed. At this meeting and at other times, Green stated that the mortgage would be a first lien on the vessel, and the various subscribers to the mortgage note made their subscriptions upon Green's representations that the mortgage would be a first claim. The mortgage was executed to F. H.

Ransom, as trustee for the various subscribers to the amount of the loan.

At the time the mortgage was executed the exact amount of the claim of the Coast Shipbuilding Company against the ship had not been determined. Subsequent to the execution of the mortgage the Coast Shipbuilding Company assigned its claim to appellants, Bankers Discount Corporation.

After the ship was put in commission again she made a trip along the west coast and was libeled at San Pedro for seamen's wages. Appellee J. V. Mason made certain expenditure in releasing her and in returning her to her home port at Portland, Oregon.

Default was made in the payment on the mortgage and appellee, F. H. Ransom, Trustee, started foreclosure, appellee, Mason intervened, setting up his claim for expenditure in releasing and preserving the ship, and appellants, Coast Shipbuilding Company and Bankers Discount Corporation, intervened setting up their claims. From a decree giving priority to the lien of Mason and the mortgagee this appeal is prosecuted.

POINTS AND AUTHORITIES

Objections to the sufficiency of pleadings and proof must be taken by exception before appeal.

Admiralty Rule 24.
Pioneer Steamship Co. v. McCann, 170 Fed. 873.
Monongahela River Cons. C. & C. Co. v. Schinnerer, 196 Fed. 384.
The Quickstep, 76 U. S. 670.
The Gazelle, 128 U. S. 487.

Corporations are bound by the acts of their officers and agents acting within the apparent scope of their authority.

Sherman, Clay Co. v. Buffum & Pendleton, 91 Or. 358.

Where a principle, either negligently or intentionally, places an agent in a position to defraud a third part, and a loss occurs by reason of the agent's act without the fault of the third party, the loss should fall on the principle as between him and the third party.

Bridges v. Hurlburt, 91 Ore. 262.
Fiore v. Ladd & Tilton, 22 Ore. 202.

What are necessaries giving a right of lien depend upon the circumstances under which the expenditures were made.

The Ascutney, 278 Fed. 991.

ARGUMENT

Appellants rely upon three points for the reversal of the decree of the District Court: (1) That the allegations of the libel and the proof do not affirmatively show that the Trustee's mortgage is entitled to preferred status under the Ship Mortgage Act of 1920; (2) that Green as the agent of the Coast Shipbuilding Company had no authority to waive the lien of that corporation; and (3) that appellee, J. V. Mason, does not have a maritime lien.

I.

THE MORTGAGE

The Ship Mortgage Act of 1920 provides, under subsection D (a) that the mortgage shall have preferred status if (1) the mortgage is endorsed upon the vessel's documents in accordance with the provisions of the act.

(2) The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so endorsed.

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith, and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel.

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof, and

(5) The mortgagee is a citizen of the United States.

The libel alleges that the mortgagee is a citizen of the United States (Ap. 5) and this is undenied; a copy of the mortgage is set out in the libel and was introduced in evidence without objection (Ap. 13) and affirmatively shows that there is no waiver of preferred status; the affidavit required by the act is set out with the copy of the mortgage and evidence of its recording introduced in evidence (Ap. 137); the libel alleges the recording of the mortgage as to the date, book, page and other identification marks (Ap. 7-8) and evidence of such recording was received at the trial (Ap. 136). The only defect in either the allegations or the proof is in regard to the endorsement of the mortgage upon the vessel's document.

It is difficult to see how appellants claim they were injured by this defect in pleading and proof. The act provides that when the mortgage is filed that it shall be endorsed on the ship's documents by the Collector of Customs of the port of documentation or of any port in which the vessel is found. In the absence of allegations and proof on this point the presumption is that the Collector of Customs preformed his duty. (Sec. 799, Oregon Laws.)

If appellants were dissatisfied with the allegations of the libel or the evidence in support thereof they should

have raised the question by exceptions at the proper time.

Admiralty Rule 24.

"Defects in libel not objected to either before or during trial, and which if so objected to might have been cured by amendment under the liberal rules of pleading in admiralty, are not ground for reversal of a decree rendered thereon."

Pioneer S. S. Co. v. McCann, 170 Fed. 873.
Approved in Monongahela River Cons. C. & C. Co. v. Schinnerer, 196 Fed. 384.

"It is objected that the libel is too general in its terms and is defective because it does not state the particular acts of negligence and misconduct on the part of the tug which produced the injury, but if this were necessary the objection should have been interposed at an earlier stage of the proceedings, and cannot be taken for the first time after the cause has reached this court. It is always better to state the particular circumstances attending the transaction, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work an injury to the libellant, if the court can see that there was no design on his part in omitting to state them."

The Quickstep, 76 U. S. 670.

"In the Courts of Admiralty of the United States, although the proofs of each party must substantially correspond to his allegations so far as to prevent surprise, yet there are no technical rules for variance, or of departure in pleading, as at common law; and if libellant propounds with distinction the substantive facts upon which he relies and prays appropriate relief, even if there is some inaccuracy in his statement of subordinate facts, or of the legal effects of the facts propounded, the court may award the relief which the law applicable to the case warrants.

The Gazelle, 128 U. S. 487.

II.

WAIVER BY COAST SHIPBUILDING COMPANY

The Coast Shipbuilding Company owned 39/100 shares of the "Egeria" (Ap. 27) and was managing owner of the vessel. Donald W. Green was secretary of the company, one of the three directors, owned a 1/6 interest in the company and was managing its affairs (Ap. 159-160). This corporation had a claim against the vessel for certain alteration and repairs. The ship had made a trip to Australia and had lost considerable money and it was necessary to raise $35,000.00 to meet this deficit and make certain alterations to fit her for the coast trade (Ap. 161). To raise this sum a loan was

made and a mortgage given on the vessel. In order to induce various parties to furnish the money, Green, assured them that the mortgage would be superior to the claim of the Coast Shipbuilding Company (Ap. 84-100-105-109-110-113-115-120-161).

Appellants now claim that Green had no authority to make such a promise and waive the lien of his company that his doing so amounted to giving away the assets of the corporation and his act was never ratified by the board of directors; that Green was merely an agent and the mortgagees were bound to ascertain the extent of his authority.

When the Coast Shipbuilding Company waived its lien in order to secure a loan it was not giving away its assets. It was one of the principal owners of the vessel and it was imperative that the money be procured to protect its interest in the ship.

Mr. Green says: "It was absolutely necessary that some money be raised in some manner if the deficit was to be met and the change made. In fact, I had gone out and secured $10,000.00 to pay off the crew half an hour before they claimed they would start suit on it. Prior to the meeting in the Chamber of Commerce I attempted to raise the necessary money to meet the deficit and make the installation in other ways—several times, and had been unable to do so." (Ap. 161). A previous attempt had been made to get a loan from a bank by offering a first lien on the ship. (Ap. 91.)

If the money had not been advanced, the Coast Shipbuilding Company would have been one of the heaviest losers. It had to have the money in order to protect its interest in the vessel. Instead of giving away its assets it was using the only means possible to protect what interest it had in the ship.

Proctors for appellants now come into court and claim that Green was without authority. He was the star witness for appellants and he says that he was managing the affairs of the company (Ap. 160).

It appears from the record (Ap. 160) that Mr. Green, Mr. Sherwood and Mr. McCulloch were the board of directors of the corporation; that Mr. Green and Mr. Sherwood, a majority of the board, were present when the subject of mortgaging the vessel was discussed and when Mr. Green told the mortgagees that the mortgage would be a first claim on the ship (Ap. 99-160). Section 6869 Oregon Laws, provides, among other things, that "The powers vested in the directors may be exercised by a majority of them."

Can a corporation, when it was represented at a meeting by a majority of its board of directors, where certain promises and representations were made on its behalf, now come in and say that such promises were not authorized? This is not the law. Even though Green acted beyond his authority, the corporation under these circumstances would be estopped from denying the agreement.

10 Ruling Case Law 48.

This would be true though Green had acted fraudulently. He was held out by his corporation as having authority to deal in matters pertaining to the "Egeria." He obtained money from other shareholders on the representation that the corporation's claim would be waived.

Even though the corporation itself were an innocent party, the law would impose the loss upon it rather than on the mortgagees, since its own act made the misrepresentation of the agent possible.

Bridges v. Hurlburt, 91 Ore. 262.

Fiore v. Ladd & Tilton, 22 Ore. 202.

Proctors for appellants devote considerable space in their brief on the powers of the officers of a corporation under the laws of the State of Oregon, and to the proposition that anyone dealing with an agent of a corporation is bound to ascertain the agent's authority. The law of Oregon as applying to the circumstances of this case is well expressed in the case of SHERMAN, CLAY CO. v. BUFFUM & PENDLETON, *91 Or. 358*. "Since corporations can only act through their officers and agents, they have power to appoint agents with full authority to act for the corporation, and as a general rule all acts within the powers of a corporation may be performed by agents of its own selection. Express authority by resolution directing officers and

agents to represent the corporation in the execution of contracts is not indispensible with the exercise of that power. Their authority may be implied from their conduct and the acquiescense of the corporation. A person who knows that the agent of a corporation habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those charged with the conduct of the corporate business has the right to assume that such agent is acting within the scope of his authority. It is now well settled that when, in the usual course of business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. The general principle that persons dealing with corporate officers and agents are bound to take notice of the extent of their authority must, of course, be considered in connection with the equally established rule that a corporation is bound by the acts of its officers and agents acting within the apparent scope of their authority, and, if the agent appears to be acting within his authority, the person dealing with him is not charged with knowledge of extrinsic facts making it improper for him to act in that case."

III.

THE LIEN OF MASON

Subsection P of the Ship Mortgage Act of 1920 provides, among other things that "Any person furnishing repairs, supplies, towage, use of any dry dock or marine railway, or other necessaries, to any vessel," shall have a lien.

The evidence shows that all of the expenditures making up the total amount of the claim were made on behalf of the ship. That such expenditures were necessary to preserve and protect the ship. What items are proper subjects of a lien cannot be determined by considering each item of expenditure separately. The test is whether or not under the circumstances of the case, the expenditures were necessary to the ship. Thus in The Ascutney, 278 Fed. 991, expenditures for taxicab hire, telegrams, telephone, permits and postage were all considered proper items for a lien.

Mason was endeavoring to free the ship from libels, and bring her back to her home port and put her in such condition that the money invested in her would not be lost. There is no evidence that he could have done this with less expenditure and there is no evidence that the expenditures were not all on behalf of the ship and necessary in order to keep her fit for commerce.

We respectfully submit that the decree of the District Court was proper and should be affirmed.

Respectfully submitted,

JOSEPH, HANEY & LITTLEFIELD, and
JOHN C. VEATCH,

Proctors for Appellees, F. H. Ransom,
Trustee, and J. V. Mason.